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IN THE
COURT OF APPEALS OF INDIANA

TAURUS BUTLER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A04-0708-PC-492
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-9705-CF-302

JUNE 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Taurus Butler (Butler) appeals from a denial of his Amended Petition for Post Conviction Relief. He asserts ineffective assistance of trial counsel and ineffective assistance of appellate counsel. He also claims the existence of newly discovered evidence which dictates reversal.

In 1998 Butler was convicted of two counts of Murder and was determined to be a habitual offender. On Count I for Murder, he was sentenced to the maximum 65 years enhanced by 30 years for being a habitual offender. In addition, he was sentenced to a consecutive term of 65 years for the Count II murder conviction. The aggregate sentence was therefore for 160 years. The convictions and the sentences were affirmed by our Supreme Court. Butler v. State, 724 N.E.2d 600 (Ind. 2000).[1]

In the amended Petition for Post Conviction Relief, the denial of which triggers this appeal, Butler alleged that his convictions and sentences should be vacated because (1) he was denied effective assistance of trial counsel; (2) he was denied effective assistance of appellate counsel and (3) there exists newly discovered evidence which taints his convictions and sentences.

I.

Ineffective Trial Counsel

[1] The statement of facts in the Supreme Court opinion reflect that a gang-related drive-by shooting into the home of Brenda Stephens resulted in the death of her sixteen year old son and her five year old nephew. Shortly after the shooting, Robert Hatch and Bernard Weaver gave statements to the police implicating Butler as the shooter. Butler and Weaver were subsequently arrested and each charged with two counts of murder. Butler went on trial, but, for reasons involving Weaver's production as a witness, he successfully moved for a mistrial.
At Butler's retrial several months later, Weaver testified that Butler fired the shots mistakenly thinking that the target was the home of Jermaine Norris who was believed to intend to kill Butler.

(A)

Butler argues that trial counsel failed to impeach the testimony of Aeashi Sharber by bringing forth the fact that Sharber had "pending cases" at the time of her trial testimony.[2] Appellant's Brief at 11. Apparently a domestic battery charge against Sharber had been dismissed prior to Butler's first trial.[3]

In any event, Butler seems to argue that because of the existence of those charges, Sharber "may have been offered leniency" to participate against Butler. Appellant's Brief at 11 (emphasis supplied). This position is pure speculation and warrants the post-conviction court's conclusion that Butler did not establish that Sharber was biased or that she was, in fact, offered leniency.

We need not discuss this assertion further.

(B)

Butler claims that trial counsel was ineffective in failing to impeach two of the investigating police officers for prior offenses of dishonesty. Butler contends that such offenses are of probative value as to the officers' credibility in the taking of witness statements and the managing of evidence. He cites no authority for this contention.

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[2] Sharber apparently provided information to police that on the night of the shooting Butler was driving a "white Regal 4-door." A different witness testified that he heard the gunshots and then saw a "white car barreling past." (Tr. 2751). The car was identified, however, as a Ford Taurus containing four persons.

[3] The record reflects that there may have been a second battery charge against Sharber filed before Butler's first trial.

We note, however, that there is no direct assertion or record indication that either or both of the officers testified at Butler's trial. There is a suggestion in tendered proposed Findings and Conclusions that although Officer Kelley did not testify at trial, Officer Rogers may have done so. Nevertheless, we are unable to understand how impeachment was appropriate under the circumstances even as to Officer Rogers.

The offenses of Officer Rogers took place before he became a police officer. One of the convictions was for a misdemeanor some nineteen years before Butler's trial and it was not for a crime of dishonesty nor for any other of the offenses enumerated in Indiana Rule of Evidence 609. Furthermore, the second offense was for Deception as a misdemeanor for which Rogers was fined $1 and costs approximately eighteen years before Butler's trial. As to Officer Rogers therefore, even if he testified at the trial, his prior offenses would have been excluded as stale convictions, i.e. more than ten years old. Ind. Evidence Rule 609 (b). In this regard, Butler's argument is wholly without merit.

Apparently Officer Kelly, some nine-plus years prior to Butler's second trial, was charged with Criminal Conversion, a misdemeanor. He was placed in a pre-trial diversion program for a period of one year. See P. L. 305- 1987, § 24, now I.C. § 33-39-1-8. Accordingly, there was no conviction for that offense. It is not proper to impeach by evidence of charged crimes not reduced to conviction. Smith v. State, 721 N.E.2d 213, 219 (Ind. 1999). Therefore, Butler's arguments as to Officer Kelly are likewise wholly without merit.

(C)

Butler asserts that trial counsel was deficient in his representation in two respects concerning the testimony of co-defendant Bernard Weaver.[4] It is claimed that counsel failed to request a hearing or determination as to Weaver's competency. This claim is premised upon the fact that at the post-conviction hearing Weaver testified that during the time he was in jail and at the time of Butler's trial he was heavily medicated and sedated to the extent that he did not understand the nature of the proceedings in which he was testifying. *See* Tr. 28. Notwithstanding Weaver's medicated condition, the post-conviction court concluded that no other evidence was presented relating to Weaver's competency to testify and that, furthermore, he "gave a large amount of basically coherent testimony at trial." Appellant's Appendix at 238.[5]

We cannot say with any degree of confidence that the court erred in rejecting the claim of ineffective assistance for failure to request a competency hearing for Weaver.[6]

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[4] Weaver had been charged with two counts of murder involving the shooting which killed the two boys. Pursuant to a plea agreement Weaver pleaded guilty and testified at Butler's trial. It was this eleventh hour guilty plea by Weaver who was in jail awaiting trial which resulted in the granting of Butler's mistrial motion in his first trial in 1997.

[5] During the post-conviction hearing there were repeated references to various portions of the trial transcript. It is also apparent that the trial court transcript was used by both counsel during that hearing. Be that as it may, the record before us does not include or incorporate those evidentiary matters.

[6] We make this statement even though Butler's attorney for the first trial had questioned Weaver's competency and had initiated efforts to have him evaluated but did not follow through because Weaver had indicated that he would assert his Fifth Amendment protection and would not testify at Butler's trial. Apparently it was not until the third or fourth day of trial that it was learned that Weaver had negotiated a plea. That Butler's initial counsel had concerns about Weaver's competency does not necessarily carry with it a conclusion that Butler's second attorney was ineffective for not pursuing a competency determination. To the contrary, it is noted that Weaver's own counsel obtained medical psychiatric evaluations in 1997 which in 1998 led to a competency hearing. At the time charges were still pending against Weaver, and Butler was awaiting retrial. The court concluded that Weaver's behavioral manifestations were "intentional for the purpose of reaching an invalid conclusion of mental disease or defect." Appellant's App. 295. The court therefore concluded that Weaver was competent to stand trial and to assist his counsel and that he understood the nature of the proceedings against him. In this light we

Somewhat as an aside and without citation to authority, Butler also alludes to inconsistencies in Weaver's references to whether or not Butler has spoken with and threatened Weaver at the jail. Butler does not indicate any resulting prejudice to him. To the extent that the nature of the inconsistencies might reflect upon Weaver's mental stability or competence, that matter has been adequately discussed.

It is alleged that counsel should have objected to certain "hearsay" testimony from Weaver to the effect that a "dude in the block told him what Taurus said." Appellant's Brief at 13. The communication was also described as indicating that Butler had "changed his story." Appellant's Reply Brief at 4. Butler does not provide any dimension to the matter except to suggest that the communication was an indirect communication from Butler to influence Weaver's testimony. We are unable to make that connection and so do not address the matter further.

(D)

Butler asserts that counsel should have objected to and moved to strike testimony from Ronnie Smith because the State called Smith for no other reason than to impeach him. The post-conviction record contains no mention of this issue other than a question to Butler's trial attorney as to why he did not object. To this question, the State's objection was sustained. There is no other evidence from the trial record or otherwise which would permit our resolution of the issue. Accordingly, we decline to address the matter.

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can understand why Butler's counsel for the second trial did not seek a new separate competency hearing for Weaver.

(E)

Butler maintains that trial counsel failed to object to erroneous habitual offender instructions contrary to Parker v. State, 698 N.E.2d 737 (Ind. 1998) and Seay v. State, 698 N.E.2d 732 (Ind. 1998). The post-conviction court purportedly rejected this claim on grounds that there was no reason to believe that counsel knew or should have known about those decisions which were handed down two weeks before Butler's conviction.[7]

The instructions complained of are not before us. We are, therefore, not able to determine whether they were in fact erroneous, or if they were whether counsel should have relied upon Parker and Seay. Accordingly we will not reverse the post-conviction court judgment upon this ground.

In conclusion, we hold that Butler has not demonstrated that he received ineffective assistance of trial counsel.

II.

Ineffective Appellate Counsel

Appellate counsel's performance is challenged upon grounds that he erroneously failed to argue sufficiency of the evidence. This assertion is based upon the premise that "there is overwhelming evidence that there were two shooters which calls into question whether Butler in fact even killed either of the victims." Appellant's Brief at 18.

[7] Although the tendered proposed Findings and Conclusions submitted by both Butler's counsel and the State are in our record, we find no entry or Findings and Conclusions from the court itself. It may be that the court adopted the proposed Findings and Conclusions from the State which contained the reasoning attributed to the court but we simply do not know.

In this regard, it is Butler's theory that there was some evidence that both Butler and Robert Hatch had been directly involved in the shooting incident[8] and that there were shell casings at the scene from two different weapons.[9]

Appellate counsel testified that his reason for not making a sufficiency of evidence argument was strategic. He stated that:

> [T]he sufficiency of the evidence was an extremely weak argument. I wanted the Supreme Court to pay attention to the arguments that I did raise.... I didn't think they'd listen to [a sufficiency claim].

(Tr. 95).

In light of the evidence, it was more than reasonable for appellate counsel to conclude that the Supreme Court would reverse the conviction upon Butler's theory that the jury would have decided that Hatch rather than Butler fired the fatal shots. As our Supreme Court said in Azania v. State, 738 N.E.2d 248, 251 (Ind. 2000): "Appellate counsel is not required to raise every possible claim, but must winnow out weaker arguments and focus on the most promising issues for review."

Butler has not demonstrated that appellate counsel was ineffective.

III.

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[8] Butler asserts that at Weaver's guilty plea hearing, Weaver stated that he saw Hatch shoot a gun. *See* Appellant's Brief at 6.

[9] Butler's characterization of "overwhelming" evidence is exaggerated at best. Some 18 cartridge casings were recovered from the scene. A forensic firearm examiner testified that he examined the cartridges as well as an SKS semi-automatic rifle, presumably alleged to have been the weapon used by Butler. He also examined a 40 caliber semi-automatic pistol which may also have been involved in the shooting. His testimony, however, was that the latter weapon "had no role in firing any of the submitted cartridge components." (Tr. 57). He stated that 16 of the 18 cartridges were fired from the same weapon but could not conclusively say that they were fired from the SKS. However, he further said that the tested cartridges could not be excluded as having been fired from that weapon.

Butler claims that certain facts exist which were not brought to the attention of the court or the jury and which dictate reversal. These alleged newly discovered facts involve the firearms examiner's analysis of the two weapons and the recovered cartridge casings, Weaver's statement at his guilty plea hearing that he saw Hatch shoot, and adequate cross-examination confrontation was denied by Weaver's medicated or sedated state.

We posit that all three of these issues have been adequately covered by our discussion in other parts of this memorandum decision.

CONCLUSION

Finding no cause for reversal we hereby affirm the judgment of the Post-Conviction court.

ROBB, J., and BROWN, J., concur.